***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

ORIGINAL

# 76-6102

*To be argued by*
SAM RESNICOFF

B

P/S

## United States Court of Appeals
FOR THE SECOND CIRCUIT

ARNOLD HAJE, THOMAS BEVILACQUE, LOUIS C. RESLER, JOHN J. SHANNON AND WARREN C. McDOWELL,

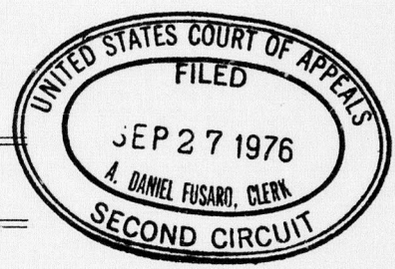
*Plaintiffs-Appellants,*

*against*

ROBERT E. HAMPTON, Chairman, JAYNE B. SPAIN and L.J. ANDOLSEK, Commissioners, constituting the UNITED STATES CIVIL SERVICE COMMISSION, BILLIE H. VINCENT, Facility Chief, New York Center, GERALD SHIPMAN, Personnel Officer, New York Center, LOUIS C. POL (Acting) Facility Chief, FAA, New York Center, DEPARTMENT OF TRANSPORTATON, FEDERAL AVIATION ADMINISTRATION, Eastern Region, Federal Building, Jamaica, New York, and the UNITED STATES OF AMERICA,

*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK




## PLAINTIFFS-APPELLANTS' BRIEF

SAM RESNICOFF and MURRAY A. GORDON, P.C.
*Attorneys for Plaintiffs-Appellants*
Office & P. O. Address
666 Third Avenue
New York, N.Y. 10017
661-7900

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*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## Plaintiffs-Appellants Brief

### Preliminary Statement

This action was instituted in the United States District Court, Eastern District of New York on March 22, 1974. Issue was joined by the service of an answer on August 30, 1974. Both sides moved for summary judgment. The motions were argued before Judge Costantino on February 20, 1975.

In a memorandum decision dated June 1, 1976, Judge Costantino granted appellees motion for summary judgment (124a-130a). A judgment was entered on June 4, 1976 (131a). The

appeal herein is from that judgment (132a-133a)

## THE ISSUES

Appellants were tenured civil service employees in the Federal Aviation Administration occupying positions in the classified service. Appellants were not dismissed because of any delinquency or misconduct in the performance of their duties. They were dismissed because of alleged inability to pass an oral examination for promotion to a higher position - a promotion which they never sought or requested (40a-41a).

Appellants were not charged with incompetency, misconduct, insubordination, lateness or any violation of the rules and regulations of the agency (117a). Appellants were dismissed not because of inability to satisfactorily perform the functions and duties of the position which they permanently occupied but because they allegedly failed to properly answer oral questions which were posed to them by so-called Instructors designated by the agency to interrogate them for the purpose of ascertaining familiarity with the duties of the next higher position (116a).

In sustaining the drastic penalty of dismissal, the Judge below held (130a):

> "This court concludes that plaintiffs' dismissals were effectuated through proper procedures which accorded them due process. It is further concluded the factual determinations were based upon substantial evidence, that the FAA did not act arbitrarily or in abuse of its discretion, and that the dismissals were reasonably related to the promotion of the efficiency of the service."

Tenured employees in the federal civil service may be dismissed for incompetency, misconduct and for such cause as would promote the efficiency of the service (Caputo v. Resor, 360 F.2d 770). However, there is nothing in the statute which permits the FAA or any other agency to dismiss a tenured employee because of inability to pass an oral examination for promotion to a higher position.

## THE FACTS

Appellant Haje, an honorably discharged Navy veteran, was appointed an Air Traffic Control Specialist GS-7, on or about June 29, 1970 (9a). Having completed his probationary period of employment, he was promoted to Air Traffic Control Specialist, GS-9, on January 10, 1971 (9a, 115a). As a GS-9, appellant's work performance was satisfactory. He was never charged with any dereliction of duty, was never served with written charges or specifications and was never suspended from duty. In August of 1971, appellant was directed to go to school in Oklahoma City for upgrading. Appellant did not request or did he seek promotion to Grade 11. Concededly, he had no choice but to go to school (40a-41a). Appellant attended the school and upon his return to his installation was orally questioned for the purpose of determining whether he should be promoted to a Grade 11 position. In March of 1972, the Acting Facility Chief advised appellant of this proposed removal because of failure to complete upgrade training requirements. In May of 1972 appellant was dismissed "Separation - Inefficiency."

Appellant Bevilacque commenced employment with the Federal Aviation Administration as an Air Traffic Control Specialist GS-7 in July of 1970. Having completed his probationary period of employment, he was promoted in January of 1971 to Air Traffic Control Specialist GS-9 (12a, 115a-116a). As a Grade 9, appellant's work performance was satisfactory (12a). Appellant did not seek promotion to a Grade 11. He was directed to go to the school in Oklahoma (54a). He was never advised that it would be necessary for him to pass a promotion examination in order to be retained in his present grade (54a). He too was terminated because of failure to satisfactorily complete upgrade training requirements (13a). He was dismissed because of "Separation - Inefficiency."

Appellant Resler, a veteran with more than twenty-three years of military service was appointed an Air Traffic Control Specialist, GS-7, in December of 1969. Having completed his probationary period of employment, he was promoted to Air Traffic Control Specialist, GS-9, in January of 1971 (16a, 115a). As a GS-9, his work was satisfactory. He was never suspended from duty or ever charged with any dereliction. His work performance was always satisfactory. Appellant did not seek promotion to a Grade 11 position (73a). He was directed to go to Oklahoma. Like Haje and the others, Resler was terminated because of failure to satisfactorily complete upgrade training (17a). He was also dismissed because of "Separation - Inefficiency." (17a).

Appellant Shannon, a veteran of World War II and the Korean Wars, was appointed an Air Traffic Control Specialist, GS-7, in June of 1970. Having completed his probationary period of employment, he was promoted to a Grade 9 position in February of 1971 (20a, 115a). As an Air Traffic Control Specialist, GS-9, his work performance was satisfactory (20a). Appellant neither requested nor sought the promotion to Grade 11 (88a). He, like the others, had no choice. Shannon was terminated because of failure to satisfactorily complete upgrade training (20a). His removal was predicated upon "Separation - Inefficiency" (21a).

Appellant McDowell, a Vietnam war veteran, was appointed an Air Traffic Control Specialist, GS-6, in October of 1968. He was promoted to Air Traffic Control Specialist, GS-7 in December of 1968. In May of 1969, he was promoted to a GS-9 and in October of 1970 was promoted to Air Traffic Control Specialist, GS-11 (24a, 115a). As a GS-11, McDowell's work performance was satisfactory (24a). Appellant did not seek or request a promotion to Grade 12. McDowell protested his selection for the school in Oklahoma. However, he had no choice in the matter (100a). Like the others, McDowell was terminated because of failure to satisfactorily complete upgrade training (24a). After years of satisfactory service with the agency which included three promotions in the title of Air Traffic Control Specialist, McDowell was removed for "Separation - Inefficiency" (24a).

All of the appellants filed timely appeals with the New York Regional Director, Civil Service Comission (9a, 13a, 17a, 21a, 24a). The Appeals Examiner sustained the dismissals. Appellants then appealed to the Board of Appeals and Review, United States Civil Service Commission (10a, 14a, 18a, 22a, 26a). The Board of Appeals and Review affirmed the decision of the Regional Director.

This action was then instituted in this Court on March 22, 1974. An answer was interposed on August 30, 1974. Motions for summary judgment were argued before Judge Costantino on February 20, 1975. In his memorandum decision and order dated June 1, 1976, the Judge below granted defendants motion for summary judgment.

## THE STATUTES INVOLVED

### TITLE 5

Section 702. RIGHT OF REVIEW.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

### TITLE 5

### SECTION 706 - SCOPE OF REVIEW

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

TITLE 28

SECTION 1361. ACTION TO COMPEL AN OFFICER OF THE UNITED STATES TO PERFORM HIS DUTY.

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

TITLE 5

**§ 5596. Back pay due to unjustified personnel action**

(a) For the purpose of this section, "agency" means—

(1) an Executive agency;

(2) the Administrative Office of the United States Courts;

(3) the Library of Congress;

(4) the Government Printing Office; and

(5) the government of the District of Columbia.

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation.

(c) The Civil Service Commission shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees.

TITLE 5

SUBCHAPTER I - COMPETITIVE SERVICE

SECTION 7501. CAUSE; PROCEDURE; EXCEPTION

(a) An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.

(b) An individual in the competitive service whose removal or suspension without pay is sought is entitled to reasons in writing and to -

(1) notice of the action sought and of any charges preferred against him;

(2) a copy of the charges;

(3) a reasonable time for filing a written answer to the charges, with affidavits; and

(4) a written decision on the answer at the earliest practicable date.

Examination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for and the order of removal or suspension without pay, and also the reasons for reduction in grade or pay, shall be made a part of the records of the employing agency, and, on request, shall be furnished to the individual affected and to the Civil Service Commission.

(c) This section applies to a preference eligible employee as defined by section 7511 of this title only if he so elects. This section does not apply to the suspension or removal of an employee under section 7532 of this title.

TITLE 5

SUBCHAPTER II - PREFERENCE ELIGIBLES

SECTION 7512. CAUSE: PROCEDURE: EXCEPTION

(a) An agency may take adverse action against a preference eligible employee, or debar him for future appointment, only for such cause as will promote the efficiency of the service.

(b) A preference eligible employee against whom adverse action is proposed is entitled to —

(1) at least 30 days' advance written notice, except when there is reasonable cause to believe him guilty of a crime for which a sentence of imprisonment can be imposed, stating any and all reasons, specifically and in detail, for the proposed action;

(2) a reasonable time for answering the notice personally and in writing and for furnishing affidavits in support of the answer; and

(3) a notice of an adverse decision.

(c) This section does not apply to the suspension or removal of a preference eligible employee under Section 7532 of this title.

TITLE 5 CHAPTER 77 - APPEALS

SECTION 7701. APPEALS OF PREFERENCE ELIGIBLES

A preference eligible employee as defined by section 7511 of this title is entitled to appeal to the Civil Service Commission from an adverse decision under section 7512 of this title of an administrative authority so acting. The employee shall submit the appeal in writing within a reasonable time after receipt of notice of the adverse decision, and is entitled to appear personally or through a representative under regulations prescribed by the Commission. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority and shall send copies of the findings and recommendations to the appellant or his representative. The administrative authority shall take the corrective action that the Commission finally recommends.

## POINT I

SINCE ALL OF THE APPELLANTS WERE TENURED EMPLOYEES OCCUPYING PERMANENT POSITIONS IN THE COMPETITIVE CLASS OF THE CIVIL SERVICE THEY COULD NOT BE DISMISSED BECAUSE OF ALLEGED INABILITY TO PASS AN ORAL EXAMINATION FOR PROMOTION TO A HIGHER POSITION.

Upon being terminated by the agency, each of the appellants as a tenured employee occupying a permanent position in the competitive class of the civil service and as a preference eligible employee, filed an appeal with the Civil Service Commission pursuant to Title 5, Section 7701, U.S.C. and the Rules and Regulations of the Commission. Each of the appeals was accepted by the Regional Director under Part 752-B of the Commission's Regulations. Although the Appeals Examiner sustained the dismissals he held:

> "The appellant is a career employee with Veteran's Preference who has completed a probationary period of employment in the competitive service. His removal constituted an adverse agency action as defined by the Civil Service Regulations."

In his decision, the Judge below held (124a-125a):

> "The following facts are not in dispute. Plaintiffs are former non-probationary employees of the Federal Aviation Administration (hereinafter FAA) who were dismissed from the federal civil service and from their air traffic controller positions solely because they failed to qualify for promotion to the next higher position. The decision to dismiss plaintiff was made after they had failed to achieve satisfactory scores on oral qualifying tests given by FAA instructors."

Obviously, the Judge below found and recognized appellants status as tenured preference eligible employees. However, relying on Sullivan v. United States, 416 F.2d 1277, a Court of Claims decision, the Judge concluded that appellants were trainees and were "employed in order to learn" (126a), and not "those who have learned in order to be employed." The decision is not only inconsistent, but is unworkable, unrealistic, and without basis in fact or law.

The Judge below erroneously relied upon Sullivan v. United States, decided by the United States Court of Claims in October of 1969. That decision, is neither controlling nor dispositive for a number of reasons. First, the decision is not binding on this court. Secondly, the case is easily distinguishable. Thirdly, the opinion of the Trial Commissioner which was adopted in a per curiam opinion, stated:

> "To the above, this caveat is added: this opinion necessarily deals only with the unusual, Commission-approved program whereby the Agency trains journeymen controllers; more particularly, with the GS-8 airways operations specialist (center) position. It must be made clear that there is no intent to adversely affect the tenure rights of employees with permanent status in the classified competitive Civil Service, even though they may not have qualified for their superiors' jobs."

At the time the Sullivan plaintiffs commenced their employment with the Federal Aviation Administration, trainees were taken on as GS-6 airways operations control specialists and were given a 4 to 8 week indoctrination course at the FAA Academy

in Oklahoma. Upon completion of their courses, their performance as trainees were evaluated by supervising air traffic controllers. If satisfactory, they were assigned to positions as GS-8 assistant air traffic controllers. As assistant air traffic controllers they were required to undergo six months on-the-job training under the supervision of journeymen air traffic controllers, and if satisfactory, they would be assigned to positions as acting air traffic controllers for thirty days. If their performance was still satisfactory, they would then be appointed to air traffic controller positions at grade 10.

The failure of the Sullivan plaintiffs to satisfactorily complete their upgrade training led to their dismissal.

Sullivan is inapposite. None of the plaintiffs in the Sullivan case were promoted to higher positions. None of them had tenure. Their assignment to a GS-8 position was dependent upon proper performance and subsequent appointment to air traffic controller positions grade 10 if their satisfactory performance continued.

However, in the case at bar, all of the appellants were actually promoted on several occasions to higher positions in the FAA based upon performance. A promotion is an advancement from a permanent grade to a higher position. In the Sullivan case, none of the plaintiffs were promoted. Appellants however, were promoted. Their promotions were not ephemeral. They were permanent in nature and could not be obliterated except for cause. Their property right in the promotion could not be taken

away because of alleged inability to answer oral questions dealing with the duties of a higher position.

In any event, should this Court adopt the rationale enunciated in the Sullivan case by the Court of Claims, that decision would still be inapposite because the appellants herein at the time of their dismissal had been promotees and were tenured employees possessing a property interest in their positions (Board of Regents v. Roth, 408 U.S. 546 and Perry v. Sinderman, 408 U.S. 593).

The Judge below cited several cases to justify his conclusion. McTiernan v. Gronowski, 337 F.2d 31, Jaeger v. Stephens, 346 F.Supp. 1217 and Bishop v. McKee, 400 F.2d 87, dealing with disciplinary proceedings and reinstatement are not relevant. Similarly, United States v. Professional Air Traffic Controllers, 438 F.2d 79, dealing with work stoppage, Air Line Pilots Association v. Quesada, 276 F.2d 892, dealing with age requirements for pilots on an aircraft, and Rolles v. Civil Service Commission, 512 F.2d 1319, dealing with resignation and termination are equally irrelevant.

The tenuous attempt on the part of the FAA to justify the dismissals upon the claim that the removal promoted the efficiency of the service, is neither persuasive nor sound. Eo converso, the dismissal of tenured employees in the absence of any misconduct, neglect of duty, venality or any conduct involving moral turpitude is a classic example of bureaucratic arrogance, devoid of any compassion, heart or understanding. The extreme penalty of dismissal meted out to appellants is so disproportionate as to be shocking to one's sense of fairness.

In the absence of any proof or evidence that appellants were not properly performing their duties in the positions which they permanently occupied, they should have remained in their permanent grades.

A perusal of Sections 7501 and 7512, Title 5, U.S.C., neither authorizes nor justifies dismissal of a tenured competitive civil service employee because of alleged failure to satisfactorily answer oral questions relating to the duties of the next higher position. Removal of a tenured civil service employee can only be premised upon a charge of misconduct. For example, a Typist Grade 2 is required to type 60 words a minutes. A Senior Typist (which pays a higher salary) requires the incumbent to type a minimum of 130 words per minute. The Grade 2 Typist competes for the Senior Typist position but can only type 110 words per minute. Is she to be dismissed? A street cleaner competes in a promotion examination for Assistant Foreman. He fails in the examination. Should he be dismissed as a street cleaner? Not everyone can be a General. We must have Privates and Lieutenants.

Unless a civil service position is abolished in good faith or the tenured employee is guilty of misconduct or neglect of duty, he may not be removed. Until such time as Congress appropriately modifies or changes existing law, no government agency has the right to establish or legislate new guidelines for the removal of permanent civil service employees. The removal of appellants under the guise of promoting the efficiency of the service is a sham and must be rejected.

Ten years ago, this Court considered an adverse action which the agency contended came within the overly broad umbrella of "promoting the efficiency of the service." In Caputo v. Resor, 360 F.2d 770 (May 16, 1966) twenty civilian employees occupying permanent positions in the Department of the Army were transferred to the Post Office Department resulting in a loss of salary. The plaintiffs accepted the proposed transfer under protest and appealed to the New York Regional Director of the Civil Service Commission who rescinded the action. The Post Office Department appealed and the Civil Service Commission reversed. An action was then instituted in the Eastern District. Rosling, J. after a remand, granted summary judgment for defendants. On appeal, this Court Lumbard, C.J., Waterman and Moore unanimously reversed. In writing for the Court, Judge Moore held:

> "The contrary construction urged by the defendants is, as the District Court recognized, 'indeed a harsh one,' since it means that plaintiffs would be forced to take large cuts in pay merely because of a paper transfer of the same activities from one Government agency to another - a result which would be against common standards of fairness, as well as contrary to the policy of Section 14 of the Veterans' Preference Act, 5 U.S.C. Section 863, which as extended by executive order provides that no employee in the competitive civil service shall be reduced in compensation 'except for such cause as will promote the efficiency of the service.' It is hard to think of a result which would be more likely to injure the morale and efficiency of federal civil servants than that urged upon us by the defendants." (citing cases).

The luminous decision by this Court in Caputo applies to the case at bar. Under no circumstances could it be held that the removal of appellants would or did promote the efficiency of the service.

As veterans and tenured employees occupying permanent positions in the competitive class of the civil service, appellants had a property interest in their positions and could only be removed, demoted or suspended in the mode and in the manner provided by law. All of the statutes pertaining to civil service are an attempt by Congress to hold agencies to a standard of social justice in their dealings with competitive civil service employees. They are intended as a protection for the conscientious civil service employee who is making Federal employment his livelihood. The protection may not be whittled away (Stringer v. U.S., 117 Ct. Cl. 30, 90 F. Supp. 375). In Stringer, Chief Judge Jones writing for the Court, held:

> "It seems rather strange that department officials are sometimes reluctant to follow the simple requirements of an Act of Congress. Perhaps it is pride in a decision already rendered, or a desire not to acknowledge a mistake. At any rate, they sometimes seek to acknowledge the necessity of a concession grudgingly rather than openly and willingly, to make the barest sort of correction rather than a real compliance.
>
> There is nothing ambiguous about the Veteran s' Preference Act. Rightly or wrongly, it was enacted by the Congress in recognition of the great sacrifices of those who had an active part in our national defense at times when everything we cherish was at stake."

The Court further held:

> "These were not little matters. They are of vast concern to the great array of

> veterans who at least are entitled to a good-faith compliance with the rights granted by a grateful people through their Congress. We cannot set the pattern of trimming away these rights."

Anything short of reinstatement to their quondam positions would be a gross miscarriage of justice.

## CONCLUSION

THE DISMISSAL OF APPELLANTS WAS ILLEGAL AND IMPROPER AS A MATTER OF LAW. THE ORDER AND JUDGMENT BELOW SHOULD BE REVERSED AND A WRIT OF MANDAMUS SHOULD ISSUE DIRECTING DEFENDANTS-APPELLEES TO REINSTATE APPELLANTS WITH APPROPRIATE COSTS, ETC., AND COUNSEL FEES.

Dated: New York, New York
September 15, 1976.

Respectfully submitted,

SAM RESNICOFF and
MURRAY A. GORDON, P.C.
Attorneys for Plaintiffs-Appellants.

United States Court of Appeals
for the Second Circuit

Arnold Haje, thomas Bevilacque, Louis C. Resler, John J. Shannon and Warren C. Mc Dowell,

Plaintiffs-Appellants,

against

Robert E. Hampton, Chairman, et al.,

Defendants-Appelles.

**AFFIDAVIT OF SERVICE**

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Wesley McDaniel, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 2189 Pitkin Avenue, Brooklyn, New York

That on September 27, 1976, he served 2 copies of Brief on and 1 copy of Appendix

Hon David G. Trager
United States Attorney
for the Eastern District of New York
U. S. Courthouse
225 Cadman Plaza East,
Brooklyn, New York, 11201.

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

. Wesley. Mcdaniel. . . . . .

Sworn to before me this
27th day of September, 1976.

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30 0932350
Qualified in Nassau County
Commission Expires March 30, 77